No. 1369

Supreme Court of the United States

OCTOBER TERM, 1946

IN THE MATTER

of

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY,

Debtor.

INSTITUTIONAL GROUP FOR BOSTON TERMINAL BONDS,

Petitioners,

v.

THE NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY, Debtor, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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Dated: May 28, 1947.

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Respondents* consist of substantially all of the secured creditors of the New Haven or their representatives,

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* Respondents comprise the following parties:

The Insurance Group; The Mutual Savings Bank Group; Bankers Trust Company, as Trustee of the Debtor's First and Refunding Mortgage; City Bank Farmers Trust Company, Trustee of the First Mortgage made by the Central New England Railway Company; Bank of New York, as Trustee under the Mortgage made by the New England Railroad Company; United States Trust Company of New York, Trustee of the Harlem River & Port Chester Mortgage; Irving Trust Company, Trustee of the Debtor's 6% Collateral Trust Indenture; Protective Committee for the Debtor's Boston and New York Air Line First Mortgage Bonds.

The principal Debtor, New York, New Haven & Hartford Railroad and the Old Colony Railroad Company Plan Committee.

the New Haven itself and the Old Colony Railroad Company Plan Committee. They have joined in supporting the provisions of the plan embodied in the Fifth Supplemental Report of the Interstate Commerce Commission,* imposing a ceiling on the obligations which the reorganized New Haven may assume for the use of the Boston Terminal property at South Station. These provisions have been approved on three occasions by the District Court for Connecticut and twice by the Circuit Court of Appeals for the Second Circuit without dissent.

Opinions Below.

Opinions of the District Court:

(i) opinion of December 21, 1943, approving the plan of reorganization embodied in the Interstate Commerce Commission's Fourth Supplemental Report with corrections, 54 Fed. Supp. 595;

(ii) opinion of March 6, 1944, approving the plan of reorganization embodied in the Fifth Supplemental Report of the Commission, 54 Fed. Supp. 631;

(iii) opinion of August 31, 1945, confirming the plan of reorganization embodied in the Fifth Supplemental Report of the Commission (not officially reported; printed at Stip. R. No. 11, p. 11891).**

Opinions of the Circuit Court of Appeals, Second Circuit:

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* The Fifth Supplemental Report and Order of February 8, 1944 is the one containing the plan of reorganization (Stip. R., No. 1, pp. 10831, 10872). The Sixth Supplemental Report of May 14, 1945 does not contain a plan of reorganization (though petitioners refer to it as so doing, Petition, pp. 1, 8), but explains certain findings in the former report not relating to the Terminal (Stip. R., No. 3, R., pp. 11682, 11703).

** Note: The Record Citations in this brief follow the system used by petitioners.

(i) opinion of January 2, 1945 upholding, with respect to the Terminal provisions, the plan of reorganization embodied in the Fifth Supplemental Report of the Commission, 147 Fed. (2d) 40;

(ii) opinion of January 13, 1947 approving the plan embodied in the Fifth Supplemental Report in all respects (not officially reported; printed at Stip. R. No. 15, p. 12655).

Jurisdiction.

The petitioners invoke the jurisdiction of this Court under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347(a)), and Section 24(c) of the Bankruptcy Act (11 U. S. C. Sec. 47(c)).

Denial of Certiorari by This Court.

The provisions of the plan with respect to the Boston Terminal (South Station) of which petitioners ask review, are those embodied in the Commission's Fifth Supplemental Report. These are the same provisions of which review on writ of certiorari was sought by petitioners and others in May, 1945. This Court denied certiorari on these petitions in *Chapin et al.,** *as Executive Committee for Institutional Group of Boston Terminal Bonds* vs. *New York, New Haven & Hartford Railroad Company,* and *Commonwealth of Massachusetts, et al.* vs. *New York, New Haven & Hartford Railroad Company,* June 18, 1945, 325 U. S. 884. A rehearing of this denial was sought by petitioners and, in turn, denied on October 8, 1945, 326 U. S. 805.

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* On the present application, petitioners have styled themselves simply as "Institutional Group for Boston Terminal Bonds."

The Boston Terminal.

The Boston Terminal Company is the owner of South Station, Boston, the union station used by the Boston & Albany Railroad, the New Haven, the Old Colony and the Boston & Providence. The two latter lines were operated by the New Haven under lease prior to the institution of the New Haven bankruptcy proceedings in October 1935. Shortly after institution of those proceedings, that lease was disaffirmed and, under Court order, the properties were operated by the New Haven Trustees for the accounts of the respective lessors. On October 30, 1939, the New Haven Trustees were directed by the District Court to discontinue advancing cash to meet Terminal Company taxes and bond interest. This action by the District Court was affirmed by this Court (*Palmer* v. *Webster & Atlas Bank*, 312 U. S. 156 (1941). On November 3, 1939, proceedings were initiated for the reorganization of the Terminal Company in the District Court of Massachusetts and its properties are now in charge of a Trustee in bankruptcy. Subsequently, in the development of a plan in the New Haven proceeding, a provision was included designed to limit the cost of this facility to the reorganized New Haven System. This provision is in the form of an offer of modified terms for the use of the Terminal to be submitted to the Terminal Company Trustee for his acceptance or rejection. The offer, if accepted, would relieve the reorganized New Haven of the obligation to use the Boston Terminal and would limit the reorganized company's obligation to make payments on account of interest and principal of the debt of the Terminal Company, for so long as it shall use the property of the Terminal Company, to an annual amount obtained by applying to $275,000 (a little more than half of the present Boston Terminal bond interest), the per-

centage of the total use of such property from time to time by the reorganized company. The new terms are subject to the proviso that if there is a substantial increase in the use of the South Station the Commission will consider an increase in the permissible payment by the reorganized company. For a full statement of the facts relating to the Terminal and of the development of the provisions of the plan designed to place a limit on the cost of this facility, respondents respectfully refer to their brief dated June 12, 1945 in opposition to petitions for writs of certiorari submitted on the above mentioned applications (October Term 1944; Nos. 1315 and 1316).

The Boston Terminal Act.

The Boston Terminal Act, the relevant provisions of which are quoted in Appendix A to the petition, creates two distinct obligations, one to the Terminal Company and one to the Terminal Bondholders. The first is the obligation imposed on the railroads by Section 10 of the Act to pay, monthly, in proportion to use, whatever is currently necessary to meet the operating expenses of the Terminal, taxes and assessments and the interest on the bonds of the Terminal Company. However, neither the Terminal Company nor its Trustee, to whom this obligation is due, is a party to this application for certiorari. The second is the obligation imposed on the using railroads under Section 4 of the Act, under which they will be responsible for their pro rata share of any amount by which the principal and interest on the Boston Terminal Company bonds exceed the proceeds of the sale of the Terminal on foreclosure, as that amount is fixed and apportioned among the using railroads by the Supreme Judicial Court of Massachusetts. The petitioners are representatives of some of these bonds.

The Plan with respect to the Terminal.

The plan imposes a limitation only with respect to the first obligation above mentioned;—that to the Terminal Company.

On the submission of the offer by the Interstate Commerce Commission, the Terminal Trustee has the following courses open to him:-

(a) *Rejection:* If the Terminal Trustee does not consider the proposed payments acceptable, he may reject the proposal and exclude the using bankrupt roads from further enjoyment of the Terminal. In that event, he would have not only the control over the property but would become the holder of an unsecured claim against the New Haven for the damages suffered by reason of the abrogation of the obligation to use and pay a share of the cost of the Terminal and also an administrative claim, payable in cash, for the fair value of the use of the Terminal since October 30, 1939—the date when the New Haven Trustees stopped advancing cash for Terminal Company taxes and bond interest.

(b) *Acceptance:* If the Terminal Trustee accepts the proposal, the statutory obligation will be replaced by an obligation to meet a proportionate share of operating expenses, taxes and $275,000 per annum on account of principal and interest on the Terminal Bonds, and the Terminal Trustee's claim for breach of the statutory obligation will be waived. Acceptance will also settle the administrative claim for use since October 30, 1939, at an amount determined in accordance with the new basis for apportioning Terminal Company expense to the reorganzized New Haven.

(c) *Inaction:* If the Terminal Trustee neither accepts nor rejects the proposal during the period fixed by the Commission in its submission to him

> *and* does not file a claim for damages within two weeks following the period while the option is open, he thereby waives any claim for damages for breach of the statutory obligations of the Act against the Debtor and the other bankrupt roads who use the Terminal.

Neither rejection, acceptance nor inaction by the Terminal Trustee will, of itself, abrogate the rights of the Terminal Bondholders to establish their claim for the amount of any deficiency apportioned by the Supreme Judicial Court of Massachusetts against the New Haven. With respect to this claim, if it arises, they will receive the same treatment accorded to all other unsecured creditors, namely, a share of the common stock of the reorganized company as finally apportioned to them and reserved under Section J(17) of the plan which provides (Stip. R., No. 1, p. 10903):

> "(17) The common stock available for distribution to the holders of unsecured obligations and claims shall be distributed among them upon the basis of the relationship between the amount of each claim as finally allowed by the court to the total amount of all such claims. • • •.
>
> The Court shall determine at the time of consummation the amount of common stock necessary to be reserved for the satisfaction of claims not then liquidated and shall reserve the amount so determined for that purpose (any excess so reserved to be sold by the reorganization committee and the proceeds distributed in lieu of stock or scrip to the holders of the new common stock)."

Analysis of Petitioners' Position.

Petitioners ask the review of this Court on the basis of an alleged error in that the Terminal Bondholders were not accorded an opportunity to vote upon the plan as New

Haven creditors. Before answering this claim of error, respondents believe it desirable to point out the inherent conflict in which the Terminal Bondholders would be involved in so voting on the plan.

The Terminal Bondholders will be claimants against the New Haven as unsecured creditors entitled to a distribution of common stock. The sound reorganization of the New Haven, however, and the prospective value of these shares depends in part upon making the reduction of the charges for the use of the Boston Terminal properties effective. It follows, therefore, that normally the general creditors of the New Haven, with whom the Terminal Bondholders would vote, would be in favor of the plan which accomplishes this reduction in Terminal charges. But if the Terminal Bondholders could have been accorded the vote for which they argue, it seems probable that they would have been influenced more by their position as owners of the Terminal bonds, opposed to the reduction of the payments to be made by the reorganized company, than as unsecured creditors of the New Haven. While this inherent conflict is not the reason why petitioners were not allowed to vote, it does show plainly that petitioners' complaint is not of any denial of their voting rights as potential New Haven creditors but, in reality, constitutes an indirect attempt, in the guise of New Haven parties, to upset terms of the plan that are necessary to the sound reorganization of the New Haven.

The reservation of common stock for issue in satisfaction of the unsecured claims of the Terminal Bondholders for the possible deficiency places them on a par with the other New Haven unsecured creditors. Under the reduced capitalization which the Commission has found that the reorganized New Haven can support, common stock is all that is available for issue to the holders of unsecured claims. The Terminal parties have offered no criticism of this award to claims of this class.

ARGUMENT.

POINT I.

The confirmation of the plan without a vote by the Boston Terminal Company or the Boston Terminal Bondholders was in accord with the statute.

A liability to the Terminal Bondholders, for any deficiency arising on the foreclosure of their mortgage of the Terminal property under Section 4 of the Boston Terminal Company Act, has yet to come into existence. As provided in that Section, the New Haven and the other railroads which use the Terminal will become liable for such deficiency, if at all, only when and if there is a foreclosure, and if a deficiency occurs at the foreclosure sale, and then, only when the amount thereof has been apportioned among them by action of the Supreme Judicial Court of Massachusetts. The claim which is to be finally determined by such apportionment is the claim which the Circuit Court of Appeals held had not been allowed and could not be liquidated and allowed prior to submission for a vote without undue delay (Stip. R., No. 15, p. 12682).

Petitioners contend that by the District Court's Order No. 45 this claim has in fact been allowed or, in the alternative if such is not the case, that the claim should, as a matter of law, have been allowed before submission of the plan to creditors for voting.

Order No. 45 relating to the filing of claims in these proceedings recognizes the contingent nature of this liability. It did not purport in any way to allow a claim of the Terminal Bondholders. Paragraph 41 of the Debtor's Petition for Order No. 45 recites that the Debtor, with the other railroad companies, "is liable to pay any deficiency following foreclosure of the mortgage" in accord with the Boston Termi-

nal Company Act (see Appendix C to Petition). While petitioners stress Paragraph 3 of the order, that, in fact, provides only that no further claim need be filed with respect to the Boston Terminal mortgage and that, in the absence of protest, the aggregate amount of the bonds secured by the Terminal mortgage will be taken as correct (Paragraph 6). Paragraph 7 of this order, moreover, provides that (Stip. R., No. 20, p. 9):

> "7. That nothing contained herein shall constitute a determination of the nature or extent of the liability of the Debtor upon any claim now or hereafter filed hereunder, or upon any guaranty, endorsement, or other contingent obligation nor shall constitute the allowance by the Court of any claim against the Debtor. . . ."

By express provision of Order No. 45, that order does not operate as an allowance of the Terminal Bondholders' claim. Indeed, as the Circuit Court pointed out, it is difficult to perceive how there could be an allowance of such a claim by the District Court which has no jurisdiction over foreclosure of the property or power under the Boston Terminal Company Act to apportion any deficiency among the using railroads.

In connection with Order 45 and their status in these proceedings, the petitioners confuse the fact that they are creditors under the very broad definition of creditors in Section 77 with the isolated problem of allowing them to vote. There is no dispute that $15,500,000 of Terminal bonds are outstanding. Paragraph 6 of Order 45 admits this. It is not disputed that if there is a deficiency on the Terminal foreclosure, there will be a claim against the debtor. It is not disputed that the Terminal bondholders are potential creditors to that extent. But this does not

mean that they may vote, for, under the Statute, only a particular class of creditors may vote: those whose claims have been filed and allowed.

Despite the complete contingency of the claim of the Terminal Bondholders, it is not destroyed or disallowed by the plan. Under the provisions of Paragraph J(17) of the plan, quoted in the preliminary statement above, common stock of the reorganized company is reserved pro rata for issue in satisfaction of all unsecured claims including those of the Terminal Bondholders, if they ever arise.

Any liability to the Terminal Trustee will arise only in the event that the proposal in the plan for a reduction in the payments for the use of the Terminal is rejected by the Terminal Trustee and he elects to rely upon his claim for damages for breach of the obligation to use the Terminal imposed by the Act. In that event, he will receive common stock for his damage claim pursuant to Paragraph J(17) of the plan and cash for his administrative claim pursuant to Paragraphs L and N(4)* of the plan.

With respect to voting on an approved plan, Section 77(e) of the Bankruptcy Act provides:

> "The plan [after approval] shall then be submitted by the Commission to the creditors of each class whose claims have been filed and allowed in accordance with the requirement of subsection (c) hereof * * * " (Bracketed insertion supplied.)

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* These provisions of the plan seemed clear to respondents. In response to questions raised by petitioners in regard to them in the Courts below, however, the District Court and the Circuit Court of Appeals construed them favorably to the petitioners. They now complain, that in so doing, the Courts have usurped the functions of the Commission (Petition, p. 10). In the light of the provisions of Section R of the plan, that it may be construed by the Court and that such construction shall be final, the force of the petitioners argument is hard to appreciate (Section R of the plan is at Stip. R, No. 1, p. 10921).

The above provision of Section 77(e) of the Bankruptcy Act is clear that a creditor, in order to be a voting creditor must be the holder of a claim which is both filed and allowed. The wisdom of this double qualification is made obvious in the present case. If the petitioners' claim is to be admitted to vote without allowance, it will be impossible to say what weight is to be given to their vote in the absence of any evaluation of the claim in dollars. Certainly, it would be most unfair to the other unsecured creditors of New Haven to admit this claim, which is wholly unknown in amount, to voting as a part of their class. Nor would the Terminal Bondholders themselves have an adequate basis on which to vote until they knew the amount of their claim and the resulting amount of new common stock they will be entitled to receive.

It would have been clearly unfair to admit the Terminal Bondholders to vote on the basis of a constructive allowance of the full principal amount of the outstanding bonds, where the amount actually represented by their claim is, as yet unascertained. The cases upon which petitioners rely as an indication that the courts below have erred in failing to allow them to vote as if the holders of a $15,500,000 deficiency wholly apportioned against the New Haven, concerned direct obligations presently in existence but possibly uncertain in final amount.* No question of voting upon a constructive allowance of a claim was involved in these cases. All that they may be taken as declaring is that in reorganizations, various classes of contingent claimants

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* Among the cited cases, are *City Bank Co.* v. *Irving Trust Company*, 299 U. S. 433 (1937); *Kuehner* v. *Irving Trust Co.*, 299 U. S. 453 (1937), and *Connecticut Ry. Co.* v. *Palmer*, 305 U. S. 493 (1939). They involved claims of lessors upon disaffirmance of leases where the lessee is directly obligated to perform all the covenants of the lease.

are to be treated as creditors. That is not an issue, however, between petitioners and respondents, for the petitioners have been treated as creditors, save for the purpose of voting which, under the Statute and as a practical matter, was impossible. The cited cases also have the distinguishing feature, that they involve direct liabilities, whereas the liability to the Terminal Bondholders is at most, an agreement of indemnity. The cases do not bear upon an agreement of indemnity like the present one where no liability is presently in existence and where a claim will only come into being when the potential claimant has satisfied a condition precedent.

There is nothing in the *Akron* case (*In re Akron, Canton & Youngstown Rwy. Company,* 117 Fed. (2d) 961 (C. C. A. 6) (1941)) or in this Court's decision in *Reconstruction Finance Corporation* v. *Denver & Rio Grande, Western Railway Company,* 328 U. S. 495 (1946), or *In re United Cigar Stores Co.,* 73 Fed. (2d) 296 (C. C. A. 2nd) (1934) cert. den., 293 U. S. 708 (1935), cited by petitioners, which bears upon a wholly contingent liability like that which may ultimately accrue to the Terminal Bondholders. In the *Akron* case both the Akron, Canton & Youngstown Railroad and the Lake Erie & Western Railroad were directly and primarily liable for the obligation of the bonds which had been guaranteed. The *Denver* case involved the disposition of additional collateral for regularly outstanding bonds of the Denver Railroad. In respect to these the Denver was directly and primarily liable. The *United Cigar Stores* case involved the obligation of a note. All these cases have in common a direct obligation of a definite maximum amount whereas in these proceedings, there is no ascertainable amount until the deficiency, if any, has been determined and apportioned.

Not only does the Act under which this claim is made require a determination of the Terminal Bondholders' claim in a particular way—through action by the Terminal Bondholders in the Supreme Judicial Court of Massachusetts—but it requires little imagination to see, that if this process had been attempted by the Connecticut District Court or the New Haven parties at any time up to the present, it would have been met with vigorous opposition on the ground that it was an attempt to prejudge the Terminal parties' constitutional argument against the effectiveness of the plan to alter the statutory obligations of the Boston Terminal Act.

Section 77(e) of the Bankruptcy Act does not give the District Court any power to withhold the voting on a plan until such time as a tardy creditor has put himself in a position to vote on an allowed claim. Rather, the Act directs the Court, upon approval of a plan, to file a copy of his opinion with the Commission, whereupon the plan "shall then be submitted to the creditors of each class". This offers no authority for further delay to allow for proof of claims not ready for allowance.

Section 57(d) of the Bankruptcy Act authorized the action of the District Court in confirming the plan without awaiting liquidation of the Terminal Bondholder's claim. As the Circuit Court pointed out, other provisions of the Bankruptcy Act, ancillary to those relating to the reorganization of railroads under Section 77, are applicable to railroad reorganization proceedings insofar as not inconsistent with that Act. Section 77(l) so provides. Apparently recognizing that there is nothing in Section 57(d) as applied by the Circuit Court which is inconsistent with Section 77, petitioners attempt to avoid the effect of its application by a process of construction. They assert

that if Section 57(d) applies, then certain other sections of the Act must also be taken as applicable and, in turn, if these sections are applied, an inequitable result will follow. The sections of the Act which they claim are thus brought into play are Sections 63(d) and 17. If, however, these are clearly inconsistent with Section 77, they are inapplicable under the Terms of Section 77(l).

Since Section 63(d) denies the provability of contingent claims, its inconsistency with Section 77 is immediately apparent, as the latter section makes all contingent claims provable and dischargeable in proceedings under that statute and requires that such claims be provided for (77(b)). Section 17 provides that a discharge in bankruptcy shall release the bankrupt from his provable debts. This is not inconsistent with Section 77, for under Section 77, petitioners' provable claim must be provided for in the plan (as it has been) and may be discharged. There remains thus, the wholly consistent provision, Section 57(d), upon which the Circuit Court relied in holding that these proceedings need not have been held up to await the pleasure of the Terminal Bondholders and the Massachusetts District Court and the Supreme Judicial Court of Massachusetts in foreclosing the mortgage and allocating liability.

It must be remembered that there has been default in the payment of all or part of the sums due to the Terminal Company and due from the Terminal Company to the Terminal Bondholders under the Terminal mortgage since the entry of the District Court's order directing the withholding of interest and tax payments in October 1939. Despite this lapse of time there has been no foreclosure. While a petition for leave to foreclose was finally filed in September 1945 in the District Court in Massachusetts which is charged with the administration of the Boston Terminal's bankruptcy, that Court has refused to permit the proceed-

ings to go forward to a sale without concurrence of the Interstate Commerce Commission. In the acceleration of this process the Connecticut District Court could take no part. The Terminal proceedings in Massachusetts are not within its jurisdiction, as the Circuit Court here pointed out.

POINT II.

These proceedings have been open to the Terminal Company and to the Terminal Bondholders since their inception. They have chosen to ignore the many opportunities afforded them to participate in shaping and formulating the plan and, instead, have argued that the plan could not affect them.

The Boston Terminal parties have had many warnings emanating from the Commission and the District Court* that a plan might affect their interests by modifying the obligations with respect to the Terminal and ample oppor-

* See remarks of Division 4 of the Commission on the possibilities of tax reduction in Report of Division 4 of the Commission (D. R., p. 7920); the remarks of the Commission in its First Supplemental Report, holding the Boston Terminal charges responsible for a large part of the Old Colony deficit (D. R., pp. 8057, 8060).

The District Court's opinion of December 8, 1941 reviews the situation of the Terminal and remarks, regarding the proposal of a committee appointed to consider ways of reducing the Old Colony losses as follows (D. R., p. 8959):

> "If the participating debtors are to have relief, it must be contained in the plans for their reorganization. * * * Is there any special equity which entitles the Terminal bondholders to immunity from the onslaughts which time and changing conditions have wrought upon the great bulk of the capital invested in this enterprise?
>
> To meet this situation the report of the Compromise Committee suggests appropriate modifications of the charters of the debtor railroads whereby a ceiling is imposed upon the amounts they shall be obligated to pay to the Terminal Company."

tunity to participate in shaping and formulating such a plan.*

The participation of the Terminal Bondholders, save for an attempt, late in 1942, to offer some proof as to the value of the Terminal after the Commission had made its Third Supplemental Report, has been by assertion that no New Haven plan could legally affect the obligations due the Terminal Company under Section 10 of the Boston Terminal Act. This obligation, they claimed, was inviolable. The District Court has described the position which the Boston Terminal interests have taken up to the time when, after

* The following major events in the New Haven proceedings put the Boston Terminal and the Boston Terminal bondholders on notice of these proceedings and of the likelihood that a plan of reorganization for the New Haven and Old Colony would probably deal with the obligations imposed under the Boston Terminal Acts:

1. March 13, 1936—Notice by publication of the pendency of these proceedings similar to that given all New Haven and Old Colony creditors in pursuance of the District Court's Order No. 45 (D. R., p. 447).

2. October 17, 1939—Intervention, specially, by the Trustee of the Boston Terminal bonds in opposition to the withholding of the payment of Terminal taxes and interest on the Terminal bonds by the New Haven Trustees. The affirmance of the District Court's Order permitting this suspension of payment by this Court in February, 1941 gave notice that the plan of reorganization might deal with these charges.

3. December 7, 1939—General intervention in these proceedings by the Trustee in Bankruptcy of the Boston Terminal Company before the Interstate Commerce Commission.

4. December 8, 1941—Opinion of the District Court calling attention to the need for a reduction in the Boston Terminal costs and commending a report of a Compromise Committee making a proposal for such reduction.

5. January 27, 1942—Notice by mail to the Boston Terminal Company and notice by publication, similar to that given all New Haven and Old Colony creditors, to the other Boston Terminal parties of hearings to be held before the Commission, beginning February 17, 1942 relative to the matters discussed in the District Court's opinion of December 8, 1941.

the plan in this regard had been fully worked out before the Commission, they sought to offer evidence before the District Court relating to the value of the Terminal facility, thus (D. R., p. 10760):

> "In the light of such considerations, it will be seen that the allowance of a reopening under such circumstances will frustrate a cardinal legislative objective—expeditious reorganization. If such practice shall have sanction, parties may safely stand outside the proceedings—just as was done by the Terminal interests in these proceedings—free to accept the product of the Commission's labor if they like it, otherwise to insist that the Commission (and all the other parties) shall begin their laborious task anew."

As noted above, the petitioners have confused their right to be treated as creditors with a single aspect of a creditor's right, that of voting. It is not disputed that the Terminal and the Terminal Bondholders are creditors, under the broad provisions of Section 77. As such, they have had every right with respect to the development of the plan which all the other New Haven creditors have had. The proceedings have been open to their participation and for their collaboration in the development and shaping of the plan. They withheld such participation until it was too late. Now, solely on the basis of the failure to permit them to vote, a right which we have shown the Court below could not have given them, they claim they have been denied all of the rights of creditors.

POINT III.

The procedure adopted by the Commission and the Courts below for dealing with the Boston Terminal problem follows a method approved by this Court.

While we believe this and the following point have been already decided by this Court in its prior denial of certiorari (*Chapin et al.* v. *New York, New Haven & Hartford R. Co.*, 325 U. S. 884), we repeat them here because we believe the petitioners' real objective is to reopen them.

The petitioners cannot dispute the adequacy of the proof of the disproportion between the cost of operating the Boston Terminal and the revenue derived from that facility. We need not burden the Court with a statement of the record in this regard. It should suffice to say that the costs of the Terminal account for 70% of the average fare paid by commuting passengers using the Terminal, leaving less than a third of the fare paid to cover the costs of the passenger's transportation to his destination.* This, and much other evidence support the findings of the Commission that the annual cost of the Terminal was far in excess of the worth of this facility and that modification of the terms for its use was imperative.

In the *Milwaukee* proceedings a somewhat similar situation with respect to the outstanding bonds and the lease of the Chicago, Terre Haute and Southwestern Railroad Company, a leased line of the Milwaukee, was presented. While the Terre Haute lines showed a favorable result on segregation of earnings, the Commission concluded that the annual rental (which provided for service of the out-

* D. R., page 9784.

standing Terre Haute bonds) of more than $1,000,000 was disproportionate to the greatly reduced fixed charges which the reorganized Milwaukee was to be permitted to assume. It, therefore, approved a plan which offered the Terre Haute and the Terre Haute Bondholders a reduced rental as an alternative to disaffirmance of the Terre Haute lease. Of this proposal, this Court said (*Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. R. Co.*, 318 U. S. 523 (at p. 546)):

> "It is pointed out that the modifications proposed by the Commission for these four classes of bondholders are to be made regardless of the lien, security, interest or maturity of each and the earning power of the respective underlying properties. Hence it is argued that this phase of the plan is not fair and equitable, since it does not even attempt to preserve the respective priorities of these bond issues. The short answer to that objection is that the Terre Haute properties have not been treated by the Commission or the District Court as a part of the properties of the debtor for reorganization purposes. Nor has any question been raised or argued here as to the power of the Commission or the District Court so to treat them. The Commission and the District Court considered the problem solely as one of rejection or affirmance of a lease. The Terre Haute bondholders were in effect given the option to take the Terre Haute lines back or to agree to a reduced rental. If the Commission had authority to determine the question of rejection in the manner indicated and if it complied with the legal requirements for the exercise of that authority, the modifications which it proposed and which the District Court approved are valid. We think they are."

The same procedure with respect to the Salt Lake Western Railroad, a subsidiary, was adopted in the *Denver* reorganization, the plan for which was upheld in *Reconstruction Finance Corp.* v. *Denver & Rio Grande Western R. Co.*, 328 U. S. 495 (1946).

The New Haven plan offers a similar option to the Terminal Trustee in bankruptcy. This officer has discretion, subject to authorization of the Massachusetts District Court and, as a practical matter, to consultation with the Terminal Bondholders, whether or not to accept the offer. With respect to the right of the Trustee to accept or reject the offer there can be no application of the "cramdown" provisions of Section 77(e) of the Bankruptcy Act. The present procedural question, regarding voting of the Terre Haute interests on a proposal made in the plan, as an alternative to rejection of the Terre Haute lease, was raised in the District Court in the *Milwaukee* reorganization and a procedure like that followed here was approved *(In re Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 36 Fed. Supp. 193, 209 (1940)). Though the Terre Haute interests appealed, they did not argue the point in the appellate courts.

The petitioners charge that the making of the offer to the Terminal Trustee was deliberately delayed to their prejudice. It is quite the contrary of the attitude which they adopted in the District Court when the plan was before that Court for approval. There they contended (see D. R., pp. 10970-10971) that the procedural vice of the plan was that the offer would be presented to the Terminal Trustee for acceptance or rejection before a court of last resort had an opportunity to decide that the provisions of the Terminal Act were not beyond the reach of the Court and Commission in these proceedings. The District Court

recognized this difficulty and construed the plan as not requiring the submission of the offer until after confirmation of the plan (see D. R. 11034-11036). Until confirmation of the plan, the offer could have been legitimately rejected by the Terminal Trustee on the ground that it was premature and that he was being asked to commit himself on the offer, though the New Haven parties were not then committed to the plan.

The plan was confirmed on September 6, 1945. The petitioners complain that the offer was not then and there submitted to them. However, from that date up to the present, petitioners have been actively litigating the legality of the Boston Terminal features of the plan—raising questions not related to the merits of the offer as an expression of the value of the Terminal to the using railroads. Had the offer been then submitted, the Terminal Trustee would have been bound to return it as again premature, as the largest group of bondholders in his reorganization proceedings were still contesting the legality of the plan and he could therefore not be asked to consider the offer on its merits without, at the same time, taking a step which might prejudice the litigation then in progress.

There is no "conflict between circuits" raised by the decision in *Consolidated Power Company* v. *United Railways Co.*, 85 Fed. (2d) 799 (1936), cert. den. 300 U. S. 633 (1937), and the decision of the Circuit Court herein with respect to the offer procedure (Petition, pp. 27, 28). The opinion in the *Consolidated Power* case expressly authorizes the reservation of the question of disaffirming an executory contract as a part of a plan so long as provision is made therefor in stock, as in the present plan (85 Fed. (2d) 799, 803). The difficulty with the Consolidated Power plan was that it neither accepted nor rejected the contract in the

plan and made no provision for the rights of the holder of the executory contract, if disaffirmed. The New Haven plan, in sharp contrast to the plan there disapproved, has not only offered every opportunity for participation by the Terminal interests, but has also provided the best treatment possible for these inchoate claims having regard to the available New Haven assets.

POINT IV.

Section 77 of the Bankruptcy Act permits the modification of obligations imposed by state statutes through a plan of reorganization.

In re New York, New Haven & Hartford R. Co., 147 F. (2d) 40, C. C. A. 2 (1945); cert. den. *Chapin et al.* v. *New York, New Haven & Hartford R. Co.*, 325 U. S. 884 (1945);

New York v. *United States*, 257 U. S. 591 (1922);

Palmer v. *Massachusetts*, 308 U. S. 79 (1939);

Texas v. *United States*, 292 U. S. 522 (1934);

In Re Missouri Pacific Railroad Company, 39 Fed. Supp. 436 (1941).

Conclusion.

The petition should be denied.

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